89-91

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CHARLES M. AND MITSUKO ANDERSON,

Petitioners

vs.

PARCOM, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I: STATUS AS A WIFE ONLY

Whether a judgment that enforcement of a mechanics' lien against Petitioners' residence amounts to an unconstitutional taking of private property without due process or consent in violation of the 14th Amendment, under conditions wherein the Petitioner/wife (one spousal Tenants by the Entirety owner of the subject residence) was not a party to the underlying contract; did not authorize the work; had no contractual connection with the supplier or installer of carpet in the subject residence; had no duty to repudiate her husband's contract with them under his own business company name; did not ratify said contract; did no act of estoppel; did no act of deception, inducement, misleading, or promising; was not a principal in agency with her husband in said contract; did not par-

ticipate in any manner with said contract or its execution; and had no knowledge of said contract or its terms or status.

QUESTION II: AGENCY (On Behalf Of)

Whether a judgment that enforcement of a mechanics' lien against Petitioners' residence amounts to an unconstitutional taking of private property without due process or consent in violation of the 14th amendment, under conditions wherein the trial court stated in a letter opinion (incorporated into final order) that the judicial determination of enforceability depends inherently upon the trial testimonial "admission" of Petitioner/wife (one spousal Tenants by the Entirety owner of the subject residence) of agency ("...authorized...on behalf of...") of her husband with her as principal, when the trial court, at later motion and be-

fore entry of final order, determined and ruled that no such testimony occurred, there was no agency, and indeed agency had nothing to do with his enforceability decision and letter opinion.

QUESTION III: LIEN FOUNDED IN CONTRACT

Whether a judgment that enforcement of a mechanics' lien against Petitioners' residence amounts to an unconstitutional taking of private property without due process or consent in violation of the 14th Amendment, under conditions wherein the trial court stated in a letter opinion (incorporated into final order) that the Virginia law on mechanics' lien enforceability is that the underlying contract has nothing to do with the creation or attachment of a mechanics' lien on the subject residence owned in Tenants by the Entirety by Petitioners/husband and wife

and also stated that the fact that Petitioner/wife had no "...underlying contractual obligation..." is not "...fatal to the enforcement...,"but the only requirement being a consenting owner/wife with "consent" coming from "acquiescence,"i.e. failure to repudiate under conditions of total non-involvement and lack of knowledge.

QUESTION IV: EQUITY AND OPINION

Whether a judgment that enforcement of a mechanics' lien against Petitioners' residence, owned in Tenants by the Entirety by spousal Petitioners, amounts to an unconstitutional taking of private property without due process or consent in violation of the 14th Amendment under conditions wherein the trial court stated in letter opinion (incorporated into final order) that the husband t/a his own

company can't make "...all necessary steps to insure completion of the construction ..." and "...signs underlying contract..." with the wife "standing by to get the benefit" and charging her property on that basis alone.

QUESTION V: BIAS & VA. CODE §54-142

Whether Petitioners received a fair hearing, due process, and equal protection of the law by an unbiased and unprejudiced court under conditions wherein the trial judge had prior to and during hearing this cause been party to intense and continuous hatred for Petitioner/husband Charles M. Anderson, multiple acts of prejudicial conduct against him, and clear conflict with him, which prejudice carried over from Petitioner/husband to Petitioner/wife in violation of the 14th Amendment.

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OPINIONS BELOW

The following orders and opinions are in the Appendix: Finding at Trial, Trial Judge Letter Opinion, Trial Judge Opinion at Motion on Agency in re his Letter Opinion, Final Order, Trial Judge Agreement with Appellant's Statement of Facts, Virginia Supreme Court's Denial of Petitioners' Petition for Appeal, Virginia Supreme Court's Denial of Petitioner's Petition for Reconsideration.

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 25, 1988 incorporating letter opinion dated November 13, 1987. A Petition for Appeal was denied on March 20, 1989 and a Petition for Rehearing was denied April 21, 1989 by the Virginia Supreme Court. The jurisdiction this Honorable Court is invoked pursuant

to the specific provisions of 28 U.S.C. 1257 (3). Due process was argued at trial, post-trial motion, and appeal.

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Article XIV, Section 1
(Fourteenth Amendment)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (argued at trial & in letter opinion)

STATEMENT OF THE CASE AND FACTS

Complainant filed a Bill of Complaint to Enforce a mechanics' lien against real property to which carpet had been installed. Petitioner Charles Anderson testified that he was not agent for his wife,

that he did the subject project as his own enterprise under his long-established sole proprietorship AA Engineering, that his wife had nothing to do with it or knowledge of it, that he told Respondent president Ishaq during contract negotiations that he (Anderson) was operating as Charles M. Anderson t/a AA Engineering on a "spec" house, and that the contract was signed as such.

Petitioner Mitsuko Anderson testified that she had nothing to do with the project, that she spoke to no one at the complainant company, that she knew nothing of the activities or status of any carpet installers or Respondent in any way, that it was her husband's business and not hers, that her husband did not do any of these activities for her or on her behalf, and that she made no contribution to a house plan, room arrangement, equipment,

selections, money to project, management, or development of ideas. Petitioners argued 14th Amendment due process.

Respondent president Paravoiz Ishaq testified (but only after being impeached by his deposition) that his contract was with Charles M. Anderson t/a AA Engineering, that he never talked to or knew of Petitioner Mitsuko Anderson, that Petitioner Charles Anderson told him from the beginning that he was building the house as a "spec" house, that no one ever reported to him anything concerning Petitioner Mitsuko Anderson, that he and Petitioner Charles Anderson contracted for 500 square yards of carpet and pad installed, and that he recommended the grade, that he never knew of Petitioner Mitsuko Anderson until he contacted his attorney three months after completion of the contract to file a mechanics'lien, and that he had no claim against Petitioner Mitsu-

ko Anderson.

Respondent witness and carpet installer Samuel Whitmire testified (but only after being impeached by his deposition) that he installed certain dimensioned areas of carpet and pad, that the subject house temperature inside during installation was about 40°F., that he had no conversations with Petitioner Mitsuko Anderson, that no one ever reported to him any conversations with Petitioner Mitsuko Anderson,and that he took instructions from Petitioner Charles Anderson only.

The trial judge made an oral finding at conclusion of trial October 8, 1987 that Petitioner Charles Anderson personally owed Respondent for 314 square yards of carpet and pad installed, the property was owned as Tenants by the Entirety by Petitioners Charles and Mitsuko Anderson, no judgment could be had against

Mitsuko Anderson, and took the matter of enforceability of the lien under advisement. Trial judge issued a Letter Opinion dated November 13, 1987 ruling in favor of enforceability. Defendants moved for reconsideration citing the errors and inconsistancies of the Letter Opinion with the facts, whereupon trial judge ruled on January 21, 1988 that Petitioner Mitsuko Anderson never testified there was agency, but specifically had testified that she did not rely on her husband for anything concerning the subject property or subject work, that there was in fact no agency, and that "My decision is not based on agency. It's not connected with the theory of agency."

On May 12, 1988 Petitoners moved for dismissal of the cause and relase of the lien founded in Respondent's failure to have a contractors license under Virginia

Code §54-142 D. and failing to give substantial performance (the court having ruled 63% of contract performance had been given), whereupon trial judge stated, "You testified that you got all you asked for," whereupon Petitioner Charles Anderson moved on May 26, 1988 for an order memorializing that false fact and false law causing trial judge to say, "I didn't say that, but I'll write you a letter giving you my decision," without ever doing so even though demanded and complained of by Petioner Charles Anderson on multiple occasions.

Final order incorporating Letter Opinion was entered March 25, 1988. Petitioners appealed. Petitioner Charles Anderson filed his Statement of Facts under Virginia Rule 5:11 which was agreed with my trial judge in writing on June 27, 1988. Petitioner Mitsuko Anderson

filed trial transcripts of testimony of Charles Anderson, Mitsuko Andrson, Paravaiz Ishaq, and Samuel Whitmire.

Petitioners filed their Petition for Appeal whch was denied on March 20, 1989 and filed their Petition for Reconsideration which was denied on April 21, 1989 by the Virginia Supreme Court.

Additional facts are that:

(1) Petitioner/husband Charles M. Anderson t/a AA Engineering contracted in writing with Respondent carpet supplier and installer to provide and install 500 square yards of carpet and pad in a house under construction being built by himself t/a AA Enginering, his sole proprietorship, as a "spec" house for sale. Respondent never knew of Petitioner/wife, one owner of this Tenants by the Entirety property, nor did Petitioner/wife have any knowledge, contact, or participation

with Respondent or in the subject contract or its execution or participation in her husband's activities.

(2) Respondent sued both spousal/owner Petitioners and admitted no contact or involvement of any kind with or by Petitioner/wife (i.e., no reliance, no fraud, no inducement, no ratification, no estoppel, no agency, no authorization, no consent, no assent, no acquiescence), that the subject real estate was owned by Petitioners as Tenants by the Entirety property, and made no claim against Petitioner/wife except to allege her status as a wife and Tenants by the Entirety owner, but demanded enforceability of the lien arguing only that Virginia Code, Title 43 mechanics' lien law causes the lien to go to the land without regard to anything else.

(3) The trial judge, already having deeply involved himself in conflict, ana-

mosity, and personal litigation with Petitioner Charles Anderson, intentionally frustrated Petitioners' discovery by denying them opportunity to be heard at motions, telling them to be quiet so that they couldn't speak, refusing to read their filed arguments, and lying of facts and law to deny all motions and assist Respondent, but still proceeded to try the case on October 6, 1987 over Petitioners' strenuous objections and motions for his recusal and most emphatic statements and warnings that he could not possibly be impartial to these Petitioners. (14th Amendment due process "taking" raised)

(4) Petitioner Charles Anderson submitted his Statement of Facts to trial judge for endorsement or correction with notice to Respondent in accordance with Virginia Supreme Court Rule 5:11. Respondent refused to argue, respond, or offer correction, sending only a young lawyer

who said he knew nothing of the case. Trial judge announced from the bench his endorsement (agreement) with the Statement of Facts which essentially agrees with his typed endorsement (agreement) signed and entered June 27, 1988. Whereupon, in spite of trial judge's agreement with Petitioner Charles Andersons's Statement of Facts, devastating to the trial judge and the conduct of the whole trial, the Virginia supreme Court ignored it upon Petitioners' Petition for Appeal. That Statement of Facts is adopted in whole and incorporated herein and is in the Appendix. (all cited law was presented at trial) All objections and exceptions were noted.

REASONS FOR GRANTING THE WRIT

This case provides the Court an opportunity to make a clear, objective statement of the law regarding enforcement of a mechanics' lien, e.g., "Virginia

Code Title 43 authorizes mechanics' liens only upon the interest in the land of the person expressly authorizing the work," "Where a Tenants by the Entirety in the fee simple is once created, the property is completely immune from the claims of creditors against either husband or wife alone," "Where property is held by husband and wife as Tenants by the Entirety, neither by their own individual act can subject the property to mechanics' lien," "Where property against which claim of lien for materials is filed is owned by husband and wife as tenants by entireties, plaintiff is not entitled to have lien enforced against the property if wife was not a party to the contract pursuant to which materials were furnished," wherein a contract is made by a Tenancy by the Entirety owner/husband concerning the subject realty under his own business

company name, without knowledge, estoppel, agency, express authorization, ratification, participation, deception, misleding, contact, consent, or anything by the owner/wife, as concerns 14th Amendment due process rights and unconstitutional taking of private property, whereas a few states allow taking upon minimal spousal involvement in the contract, most states deny enforcement absolutely, but this trial judge, although being of an absolute proscription state, ignors its own clear law and inserts therefore, for these Petitioners, "The mechanics' lien statute was not meant to be frustrated in its enforcement against estates by the entireties solely because only one spouse signs the underlying contract, when the other spouse authorizes, consents to, and stands to benefit from the work performed by the contractor un-

der the contract," and speculates with bias as to motives and intent not in evidence, and this in spite of additional clear Virginia law, "The very existence of a mechanics' lien on land, as well as the jurisdiction of the court to enforce it, depends upon statute and not upon equitable or ethical rules, so that neither the conscience of the chancellor nor the length of his foot can supplement the statute and vest the court with any jurisdiction except that which is based upon the provisions of this chapter fairly constructed," and in spite of its total inconsistancy with the facts. Feuchtenberger infra.

The Questions Presented for Review will next be taken up in turn with reference to the specific case citations.

RE QUESTION I (Status Pleading as Wife/Owner)

> Virginia Code Title 43 authorizes mechanics' liens only upon the interest in the land of the person expressly authorizing the work. Feuchtenberger v. Williamson,et al, 137 Va. 578 (1923)
>
> Where a Tenants by the Entirety in the fee simple is once created, the property is completely immune from the claims of creditors against either husband or wife alone. Vasilion v. Vasilion, 192 Va. 735 (1951).
>
> Where property is held by husband and wife as Tenants by the Entirety, neither by their own individual act can subject the property to mechanics' lien. Freeman contracting Co. v. Lefferdink, 419 S.W.2d 266 (Md. 1967)
>
> Where property against which claim of lien for materials is filed is owned by husband and wife as tenants by entireties, plaintiff is not entitled to have lien enforced against the property if wife was not a party to the contract pursuant to which materials were furnished. H&B Co. of Statesville v. Hammond, 195 S.E.2d 58 (N.C. 1973)

The law is clear, overwhelming in its clarity and in agreement with the vast

majority of all the states! The trial court refused to recognize what Judge J. Howe Brown ruled on July 17, 1985 in Smitty's Lumberteria v. Anderson, et al, Fairfax Circuit Court, Chancery No. 90299, citing the same four cases as above in a final order (copy in Appendix), which was for trial judge a precedent on the same mechanics' lien issues on the same property for these same Petitioners, and adopting the Maryland and North Carolina cases as Virginia law, viz., Feuchtenberger's requirement to avoid an unconstitutional taking without consent and due process is an express authorization or consent. See also Brown, bot. p. 18, order presented at trial.

Petitioner/wife Mitsuko Anderson had no involvement in the contract. There was no estoppel, authorization, or agency. She had no knowledge of Respondent nor they of her. She was only an owner/wife.

This total non-involvement in any form was agreed with by trial judge in his June 27, 1988 endorsement (agreement, p.61) with Petitioner Charles Anderson's Statement of Facts of May 17, 1988 (in Appendix, see ¶¶ 5 - 9,11,24,25) and is part of the trial transcript record filed on appeal and is supported by the testimony of all witnesses on both sides on the subject.

The trial judge said at the bottom of page 3 of his Letter Opinion, "...when the other spouse ... stands to benefit from the work performed..." Benefit is not the standard nor the law in Virginia nor elsewhere. The mere fact that the building adds value to the land on which it stands is not enough. The mere occupancy of the building is not enough to show acceptance. See Warren v. Goodrich, 133 Va. 366 (1922). Also where a structure is permanently affixed to real property

belonging to an individual without her consent or request, she cannot be held responsible because of its subsequent use. It becomes hers by being annexed to the soil, and she is not obliged to remove it, so as to incur an obligation to pay for it, merely because she has not chosen to tear it down, but has seen fit to use it. See Sutton v. U. S. 256 US 575, 41 S Ct 563. See also Caldwell v. Eneas, 9 SCL (2 Mill Const) 348. The trial judge was wrong.

Further argument of law on Virginia, other states, and federal standard for wife follows in the section immediately next.

RE QUESTION II (Agency) (On Behalf Of)

Judge Brown's July 17, 1985 order (p. 16 herein) said that in order to charge wife's interest in the subject realty, there must be a consent, express authori-

zation, agency, or estoppel. Trial judge's Letter Opinion said, "Mr. Anderson authorized Complainant's performance on behalf of the indivisible interests of the Andersons together..." (emphasis added) at his page 3. By "authorized...on behalf of" trial judge means agency. All witnesses for both sides denied agency. Upon trial judge's publication of the above statement totally inconsistant with the facts and law, Petitioners moved the court on January 21, 1988 for reconsideration on the issue of enforceability and called the trial translator to the stand to testify as to the falseness of trial judge's statements in his Letter Opinion about Petitioner Mitsuko Anderson's testimony, whereupon the trial judge ruled against agency and "acting on behalf of" and said (in Appendix, also see ¶¶ 11 adn 13 of Statement of Facts in Appendix):

"It appears to me that the case which has been asserted for reconsideration is, primarily, based upon an agency theory. And all of the arguments or many of the arguments that have been made here relate to the fact that there was a contract and that Mrs. Anderson was not the agent of her husband or had not joined in with him in this endeavor to build this house. That is not what the decision that I made is about. My decision is not based on agency. It's not connected with the theory of agency. (emphasis added) It is connected with the fact that improvements were made to this house, and they were made by Mr. Anderson. And connected with that is a statement made in my opinion and my opinion is, from the testimony of Mrs. Anderson, is that that testimony established that she knew that Mr. Anderson was doing this work. That she, in fact, acquiesced and assented to the performance of this work. Particularly, in this case, the carpet. That's what we are talking about, specifically. (emphasis added) And that she was willing to accept the benfits of the enhanced value to her property. Further, she was a tenant by the entirety. She knew she had an ownership in this property." (transcript 1/21/88, pp. 1-34)

Note also that he changed his mind on this subject only after attempting to frustrate the translator and discovering

that he couldn't shake her from the truth.

The Letter Opinion, obviously being strained for a pre-determined conclusion (note over five weeks from trial ruling to Letter Opinion on a straight-forward, simple, clear, well defined legal issue), was now gutted of an essential element, agency, and was without any meaning whatsoever whereas there-to-fore it was just a strained lie on the facts and law and obviously so on its face to any casual reeader.

Note also the following items in trial judge's January 21, 1988 revelations. He still clings to"acquiesced" and "assented." That's not the fact. That's not the law. She did nothing. She knew nothing. But even if she had, that's not the law as the discourse on the law below will reveal. But she didn't! Herein lies trial judg-'es strain. He just couldn't let this one

go. The relevant subject here, just as much as any other, is his hatred for Petitioner Charles Anderson. (see Question V (Bias), page 49 herein) Also note he excludes the construction of the house from consideration and includes in this cause only the carpet installation. Thus his "assent" would relate only to carpet and this Respondent and that relationship is of record and clear, uncontroverted, and even supported by Respondent as totally consistant with that as reported by Petitioners at trial.

Contributing money to the project, creating plans, providing ideas, ordering materials, receiving materials, giving directions, recepting for materials, etc. are some of the kinds of activities the law considers to estop a non-contracting (non-ordering, non-expressly authorizing, non-consenting) spouse from defending her

interest in Tenants by the Entirety property against mechanics' lien created by acts of the other spouse. Generally these are not sufficient to allow enforcement as the following discussion of the law reveals. What is required is a contracting by the wife, consent, or express authorization, estoppel, or agency. None of either group are present in this cause.

The following discussion is found in American Jurisprudence on mechanics' liens.

36 Am Jur Mechanics' Liens §106 says,

> "....in determining whether one spouse can make a contract which will subject the estate to a mechanic's lien, the question is simply whether, under the terms of a particular statute providing for a mechanics' lien, an estate by entirety is of such a quality, considering its characteristics, that it will become subject to a mechanics' lien by the act of one of the spouses."

That brings us to what the Virginia statute, Virginia Tenants by the Entirety title, and Virginia case law are as to their "terms" and "characteristics." One way to state Virginia law is that it is an "absolute prohibition" state, one spouse being absolutely prohibited from encumbering the property absent the express consent of the other spouse. This is supported by Feuchtenberger, Vasilion, Freeman Contracting Co. and H&B Co. of Statesville (p. 15 herein), clearly indicating the absollute necessity for the wife to be a party to the contract. This is the same ruling of Judge Brown on July 17, 1985. (pp. 16&18 herein)

Trial judge cites 53 Am Jur 2d Mechanics' Liens §142. That section says, assent by knowledge, failure to object, and conduct is sufficient to charge the other spouses's interest and cites two Indiana

cases and one Maryland case. The facts here are no knowledge, thus no opportunity to object, and no conduct. This was the testimony of both sides. But still that's not the Virginia law. See Feuchtenberger, Vasilion, Freeman Contracting Co., H&B Co. of Statesville (page 15 herein) and Milligan v. Alexander 72 W.Va. 615, P. Delany & Co. v. Duvoli 278 NY 328, Murray v. Zemon 402 Pa 354, and Jobe v. Hunter 165 Pa 5. See also 53 Am Jur 2d §143, p. 664 (1970). See also 75 A.L.R.3d, Annotation, Estate by Entireties - Individual Debt, p. 1188. He twisted 53 Am Jr 2d 142.

As to the standard for enforcement being a large number of instances of a large number of activities, there is an avalanch of law applicable to Virginia as an "absolute prohibition" state (p. 24):

It is generally held that the mere knowledge of a married woman that her hus-

band is making improvements upon her property is insufficient to establish the fact that he is acting as her agent. Nor - her mere failure to dissent from the proposed transaction import an intention to bind her real estate (Feuchtenberger). A number of circumstances have been held to disprove the agency of the husband as, for example, the facts that the claimant did not know that the materials in question were to be used on the wife's property; that the claimant did not know that the wife owned the land on which the improvements were made, that the wife had no knowledge that the husband purchased materials on credit, took no part in the planning, or construction of the building, suggested no alterations during progress of the work, contributed no money toward the improvement, gave no directions as to the work, or took no part in the purchase of

the materials used; and that the husband signed the contract and treated the project as his own. Other circumstances which have been held not sufficient to prove the husband's agency are the facts that the wife owned the real estate on which the improvements were made, that the house on which the improvements were made served as a family residence, that the wife said that her husband wanted the work done and that she would see them paid, as well as that if her husband were suited all would be suited. Of course, where the credit is given to the husband alone, no mechanics' lien can attach to the wife's interest. See Milligan v. Alexander, 72 W. Va. 615. 36 Am Jur Mechanics' Liens, §101. Note the relevance and significance!

Comparing the above law for Virginia with the facts of this case: Petitioner Mitsuko Anderson had no knowledge, cont-

act, authorization, agency, estoppel, ratification, duty or opportunity to repudiate, involvement -- nothing! while the contract was with Petitioner Charles M. Anderson t/a AA Engineering building a"spec" house -- all admitted to by Respondent!

Additionally, there are a number of circumstances from which the agency of the husband to contract for his wife may be inferred or implied. Among these are the giving by the wife of personal directions to the claimant as to part of the work; participation in conversations between her husband and the contractors relative to the work during the time it was being done; the furnishing of money to be paid on the building or improvement; the fact that the husband had no interest in the particular piece of property upon which the improvement was made; the delivery of most of the materials directly to the wife; and the

joining of the wife with the husband in the erection of buildings. See Jobe v. Hunter and Milligan v. Alexander, supra, 36 Am Jur Mechanics' Liens §100. Keeping in mind that Virginia is an "absolute prohibition" state, again compare this Virginia law with the facts of this cause.

Silent acquiescence (a key word in trial judge's strained, contrived Letter Opinion) will not estop a wife from setting up her title in defense of an action brought to enforce a mechanics' lien. A clear, affirmative act of consent is required. See Milligan v. Alexander, Jobe v. Hunter, P. Delany & Co. V. Duvoli, Murray v. Zemon, supra, and Hoffman v. Mc Fadden 56 Ark 217, Marshall v. Hall (Mo App) 200 S.W. 770.

Certainly she is estopped to assert her title for the purpose of defeating the lien arising out of a contract with her

husband alone, if she connives at any false representations made by him as to the ownership of the property. It has been held also that the mere fact that a wife stands by with knowledge that work is being done on her property by one hired by her husband will not estop her to assert her title to the property and to resist the enforcement of a mechanis' lien where nothing has been done to mislead the claimant as to the ownership of the property. Again compare the law to the facts of this cause. All evidence from both sides clearly shows there was no misleading, inducement, or false representations. A woman whose title appears on the records is not estopped from contesting a mechanics' lien on her property by the fact that she knew of the erection of a building, where the work was done under a contract with her husband, who had promised her

that he himself would pay for it, although the contractor supposed the husband was the owner. In the case at hand, there is no evidence as to what the complainant thought about the ownership of the property, but even if he had thought the husband was the owner, the law is that the wife is not estopped. See Jobe v. Hunter, Milligan v. Alexander, Hoffman v. McFadden, and Marshall v. Hall, supra. 36 Am Jur Mechanics' Liens §104. See Feuchtenberger.

The relationship of principal and agent between a husband and wife has been held not inferable from various circumstances as follows: It has been declared that the husband's authority to act as the wife's agent is not to be inferred from the marriage relation, from the mere fact that he occupied, or managed and controlled his wife's real estate, from the offer of suggestions by the wife concerning the build-

ing or improvements, or from the exhibition of interest by the wife in the work. It is generally held that the mere knowledge of a married woman that her husband is making improvements upon her property or was about to have certain work done, or enter into a particular contract, is not sufficient to establish the fact that he is acting as her agent. See Feuchtenberger, Hoffman v. McFadden, and Marshall v. Hall supra and Wohlmuther v. Mt. Air Plumbing and Heating, Inc. 244 Md. 321. Nor does her mere failure to dissent from the proposed transaction or to interpose objection import an intention to bind her real estate. See P. Delany & Co. v. Duvoli and Murray v. Zemon, supra. Other circumstances which have been held not sufficient to prove the husband's agency are the facts that the wife owned the real estate on which the improvements were made, and that

the house constructed, or on which the improvements were made, served as a family residence. See Warren v. Goodrich and Sutton v. U. S., supra. A number of circumstances have been held to disprove the agency of the husband, as, for example, the facts that the claimant did not know that the materials in question were to be used on the wife's property; that the claimant did not know that the wife owned the land on which the improvements were made, that labor or materials were furnished solely on the credit of the husband; that the husband signed the contract and treated the house as his own; and that the wife had no knowledge that the husband purchased materials on credit, took no part in the planning or construction of the building, suggested no alterations during progress of the work, contributed no money toward the improvement, gave no directions as to the

work, or took no part in the purchase of the materials used. See Wohlmuther v. Mt. Airy Plumbing and Heating, Inc., supra. 53 Am Jur 2d Mechanics' Liens §138.

It is very generally held that a mechanics' lien cannot be created upon the land of a married woman under a contract with her husband alone. Neither husband nor wife by virtue of the relationship alone has power to bind or act as agent for the other. See Wohlmuther, Feuchtenberger, Vasilion, Freeman, H&B Co. of Statesville supra. 53 Am Jur 2d Mechanics' Liens §136. Trial judge intentionally misconstructed 53 Am Jur 2d §142 and ignored all the other sections and cases before and after.(p.24,bot.)

Also, in some jurisdictions, statutes have required that the contract is deemed sufficient to make her property subject to such a lien. 53 Am Jur 2d Mechanics' Liens §135. Not only was Petitioner Mitsuko And-

erson not a party to any contract -- written, oral, or implied -- Respondent specifically and intentionally excluded her from any and all pleading allegations and prayer.

A court which employs a strict construction of the mechanics' lien laws has required the owner's consent to a possible mechanics' lien and held that the written consent referred to by the statute must evidence a clear intent by the owner to subject her interest in the land to a possible mechanics' lien. Silence or acquiescence is not sufficient. A clear, affirmative act of consent is required. See P. Delany & Co. and Murray, supra. 53 Am Jur 2d Mechanics' Liens §117. Virginia, an "absolute prohibition" state and speaking through Feuchtenberger, requires an express authorization. See Judge Brown order of July 17, 1985, supra. There was no

consent or authorization or "assent by conduct"(trial judge Letter Opinion) here -- only an owner/wife without knowledge. And even though there was no act of acquiescence, such an act is not sufficient in any jurisdiction. See testimony, pages 3-5.

Additionally, "consent" means a unity of opinion or an accord of two or more minds. There must be enough of a meeting of the minds to make it fairly apparent that the parties intended the same thing in the same sense. "Consent" denotes an actual and express or affirmative requirement that the improvement shall be made, and has no reference to mere knowledge and passive acquiescence by the owner to improvements by another person. See Feuchtenberger, Vasilion, Freeman, H&B Co., P. Delay & Co, Murray, Hoffman, and Marshall, supra. 53 Am Jur 2d Mechanics' Liens §117. The facts of this case fall so far short of

"consent by acquiescence" or "assent by conduct" in trial judge's Letter Opinion that it only high-lights his strained,result-oriented prejudice against these Petitioners -- and that's not even the law!

Also, while a contract by one who is not the owner or who is unauthorized to contract may be ratified where such person purported to act as agent for the owner, it is not ratified so as to allow a claim of lien against the premises by the fact that the owner, after the completion of the work, receives the profits therefrom. See Warren and Sutton supra. Thus, Petitioner Mitsuko Anderson's increased value or benefit to her land by the addition of the carpet does not bind her. Such a benefit necessarily by its very nature must always occur in these cases and is irrelevant. 53 Am Jur 2d Mechanics' Liens §118. See also Caldwell supra.

Of course, the Virginia Code and recent (1984 and 1985) case law make Virginia law on this point very clear and an "absolute prohibition" law. Creditors of one spouse may not attach real estate owned by Tenants by the Entireties; only creditors with joint debts of both spouses may reach the entireties realty. See Ford v. Poston 773 F.2d 52 (4th Cir. 1985). Also see 36 Am Jur Mechanics' Liens §106 cited on page 23 herein. See also Warren and Sutton, supra.

Thus the law clearly defeats trial judges's notion of "assent by conduct" and "acquiescence-type consent." It's not the law and it's not the facts of this case!

Petitioner Mitsuko Anderson did none of these things as evidenced by her own testimony and that of her husband and Respondent's witnesses Paravaoiz and Whitmire and by Respondent's own pleadings and

admissions to Requests for Admissions and responses to Written Interrogatories. But if she had, the law still doesn't hold her interest in Tenants by the Entirety property!

Further, as to Petitioner Mitsuko Andersons's non-involvement and status, see Petitioner Charles Anderon's Statement of Facts filed May 17, 1988 (agreed with by trial judge June 27, 1988) (in Appendix, ¶¶ 5.-9.,11.,24.&25.)

RE QUESTION III (Contract)

> "Where property against which claim of lien for materials is filed is owned by husband and wife as tenants by entireties, plaintiff is not entitled to have lien enforced against the property if wife was not a party to the contract (emphasis added) pursuant to which materials were furnished." H&B Co. of Statesville v. Hammond, 195 S.E.2d 58 (N. C. 1973)

Trial judge says,"a mechanics' lien does not represent a claim of a personal

debt owed, but instead is a claim against the property itself." (emphasis added) (p. 2 of 11/13/87 Letter Opinion) Thus he attempts to avoid the "claims of creditors" language of Vasilion, supra, by trying to distinguish the same in its origin. It is clear however that what the court said in Vasilion was a rule of law applicable to exactly what they stated, viz., claims of creditors, i.e., all claims, i.e., any claims. No matter how the case arose, the ruling is unequivacal and conclusive of "claims" in its most general sense, for otherwise the ruling would have no meaning in English usage.

Trial judge attempts to distinguish "the underlying contract" from "the work performed and material furnished" and says, "It is not the underlying contract for performing the work and supply materials which creates the lien." (p. 2 of 11/13/

87 Letter Opinion, in Appendix) However it appears that he likes to have it both ways for he argues against himself and this proposition on the next page by repeatedly referring in this case to an essential element for enforceability being, "...the underlying contract..." Note also his avoidance of the references to "contract" in the four cases cited on p.15,viz., "expressly authorizing," "act," "contract pursuant to which materials were furnished," "ordering," and "requiring."

Trial judge's notion would also imply that if work were done on the wrong lot by mistake, the work being done is the sole consideration to enable enforcement of a mechanics' lien against the interests of both a non-contracting husband and a non-contracting wife (the spousal owners of the erronious lot), an absurdity and one which flies in the face of the sa-

me four cases as to requirement for an "act" or "express authorization" or "contract" or "ordering" or "requiring."

Also he points out on his page 2 a quote from §43-3, "for the work done and improvements furnished" as support for his notion, but fails to follow the rest of his own quote, viz., "...ordered or authorized by the owner or his agent," which clearly indicates again the need for an "ordering" or "authorizing" or "agency" -- in short, a contract.

Additionally, his cite to Weaver v. Harland Corporation at his page 2 is a misrepresentation of it (like his 53 AmJur2d 142).

He again ignores the applicable Virginia law, e.g., "The mechanics lien is a creature of statute, with foundation in a contract with which it must correspond" Wallace v. Brumback, 177 Va. 36(1941). See Sergeant v. Denby, 87 Va. 206, M.J. Steigleder & Son v. Allen, 113 Va. 686 (1912), Va. Code §43-3, annotations I.

The testimony in this cause from both sides is that there was a written contract and it was between Petitioner Charles M. Anderson t/a AA Engineering and Respondent with Petitioner Mitsuko Anderson having nothing to do with it and no knowledge of it nor with or of anything concerning Respondent or the subject work.

RE QUESTION IV (Equity and Opinion)

Trial judge in his Letter Opinion at his page 3 says,

> "As is apparent from the evidence, the intent of the Andersons was to enhance the value of their property through Mr. Anderson's construction of the house, with Mr. Anderson taking all necessary steps to insure completion of the construction." (emphasis added)

and

> "The mechanics' lien statute was not meant to be frustrated in its enforcement against estates by the entireties solely because only one spouse signs the underlying contract, when the other spouse authorizes, consents to, and stands to benfit from the

work performed by the contractor under the contract." (emphasis added)

The above kind of logic ensues only when a trial judge is straining for a predetermined result. Note that the trial judge attributes to himself the devine gifit of seeing into Petitoner Mitsuko Anderson's mind to determine her intent! All testimony denies any attitude by her except indifference in the context of being without knowledge. Note also trial judge devines an intent to both Petitioners to frustrate the mechanics' statute giving no consideration to the fact that defendants have a right to defend according to the law when they get sued. His making such giant leaps clearly indicates his prejudice before hearing this matter.

Judge Brown in his July 17, 1985 letter opinion, supra, said that in order to charge the wife's interest, one would have to find express authorization, agency, or

an act of estoppel. At no time does he attempt to devine intent -- only fact and evidence.

> "The very existence of a mechanics' lien on land, as well as the jurisdiction of the court to enforce it, depends upon statute and not upon equitable or ethical rules, so that neither the conscience of the chancellor nor the length of his foot can supplement the statute and vest the court with any jurisdiction except that which is based upon the provisions of this chapter fairly constructed." Feuchtenberger, supra (emphasis added)

That case and quote is used in the annotations to Virginia Code, Title 43 as a key foundation stone to the legislative purpose. It speaks of chancellor's "conscience" and "length of his foot" for a reason that trial judge clearly had difficulty with. His foot got in his mouth and his prejudice and hatred for Petitioner Charles Anderson into his conscience. Neither is a judicial expression of the statute or facts in this cause. To rule with-

(14th Amendment)

out evidence that frustration of the statute was the intent instead of a legal defense made available by the legislature and the courts is to attribute wrongful intent to every defense that a trial judge doesn't approve of personally or to every defendant he dislikes.

But this is not the first time this trial judge has used these words. In another mechanics' lien case against the same defendants on the same subject matter on the same property on the same issues, Amer-Paving and Construction Corp. v. Charles M. Anderson, et al, Fairfax Circuit Court, Chancery No. 94646, this trial judge referred the matter to a commissioner Henry C. Mackall, which matter started all this current prejudice and hatred, and told him (as is the subject of on-going law suits by Charles Anderson in federal court against them both alleging conspiracy to take his

house by abusing the Virginia mechanics' lien laws, which the federal Fourth Circuit Court of appeals has agreed with Charles Anderson on in part) to go this "equitable" route and to ignor the facts and law. This Mr. Mackall clearly did and in a most open, notorious, hostile, disgusting, pathetic, and abominable way. He said these same words at his preliminary commissioner's meeting, during hearing and motions arguments, and in his commissioners report to the court. For three years he dragged that conspiracy out until finally, counsel for that complainant dropped the ball on what he was supposed to do so much and so badly that the judges Middleton, Brown, and Plummer could no longer afford to help him and finally Judge Plummer reached a point where he had to dismiss the cause, release the lien, and quash the commissioners report.

Consider these arguments in light of the

arguments made in Reasons for Granting the Writ under Question I (Pleading Status as a Wife), Question II (Agency), and Question III (Lien Founded in Contract) above. Something funny was going on in that Opinion Letter that took over five weeks to write and its obvious on its face!

"Equitable or ethical rules" don't make it, but even that isn't what was going on in trial judge's mind. Arguendo, if one considered them, it's only biased guesswork from the mind of a biased judge.

Petitioner Mitsuko Anderson had no knowledge -- how could she even have a state of mind on the subject of whatever kind.

Trial judge's final frustration, after the January 21, 1988 revelations on there being no agency and no consideration of it, contrary to his obviously concocted Letter Opinion, came when he had to endorse Petitioner Charles Anderson's Statement of

Facts under Virginia Rule 5:11 (d), and in fact did agree with almost all of its numbered paragraphs. Kindly refer in the Appendix to it and attend to the follow-numbered paragraphs therein to get a feeling for the depth of his state of lying confusion and the true facts according to the trial judge therein: ¶¶ 1., 11. - 17., 19., 21., 24., and 25. Now that's revealing of the truth and equity! Look at the rest of it too as affect Questions I, II, III, and V.

RE QUESTION V (Bias & Va. Code §54-142)

Upon Petitioners' motion to dismiss the cause and release the mechanics' lien founded in Virginia Code §54-142 D., failing to have a license with the State Board of Contractors, trial judge lied of the facts and refused to rule. This motion was presented at trial by way of Respondent having knowledge of the section and was pre-

sented at post-trial motion by way of Respondent not having given substantial performance, the two ways of proving the fatal lack of license mentioned in the statute. Upon the latter, trial judge denied the motion from the bench on May 12, 1988 without reading the cases provided him by Petitioner Charles Anderson then, which quantitatively defined substantial performance (the court having ruled at trial that Respondent gave only 63% performance under the contract), and stating "You testified you got all the carpet you asked for." Petitioner Charles Anderson anwered that he had not so testified but had testified on two occassions at trial of certain rooms and areas that received no carpet but were contracted to as evidenced by the shortfall between the contracted amount of 500 square yards and the ruling by the court of 314 square yards having been provi-

ded. On May 26, 1988 upon Petitioner Charles Anderson's moving for an order memorializing the lie that trial judge said on May 12, trial judge lied again and said, "I didn't say that, but I'll write you a letter giving you my decision" but failed to do so even upon Petitioner's continuing to ask for it and complaining of it. Thus Petitioners were without a final order on an issue which demanded dismissal of the cause and release of the lien because the court refused to provide it.

Trial judge was so committed to his Letter Opinion that it was (psychologically) impossible for him to consider Virginia Code, §54-142 D. to the point where he had to lie and the Virginia Supreme Court had to ignore Petitioners' Petition for Appeal in order to protect him in his ccnflict,bias, unjudicial ruling on enforceability and ignoring §54-142 D. with lies.

Virginia Code §54-128 makes it a crime to do business without the license. Fairfax County Ordinance §4-7-14 also makes it a crime. Respondent had neither license. §54-113 says this Respondent is required to have both licenses. This was uncontroverted by Respondent. §54-142 D. says that Respondent is improperly in court (without standing as a party). The result of not having the license is being out of court, i.e., the cause must be dismissed and the lien released. The contract is the basis for determining performance. The lack of Respondent's standing starts (and is governing) as of the time of contracting. Sixty-three percent completion is not substantial. All this law was presented to trial judge in written form.See F. S. Browen Elec. Co. v. Foley 194 Va 92, Rohanna v. Vazzana, 196 Va 549, Baciqualupo v. Fleming, 199 Va 827, Cohen v. Mayflower Corp, 196 Va 1153, F. N. Thompson v. Anchor Invest. Co. 239 Fed 2d 470, Smith

v. Packard 94 Va 730, Neely v. White 177 Va 358, Eastern Oil Co. v. Coulchan 65 W. Va. 531, Caldwell & Drake v. Schmulbach 175 F. 429 (C.C.W.Va. 1090), Buena Vista Co. v. McCandlish & Clowes 92 Va 297, Thomas & Moran v. Kanawha Valley Traction Co., 73 W.Va.374, Warren v. Goodrich, 133 Va 366, Baltimore & O.R.Co. v. Lafferty 2 W.Va. 104, Brown v. Aquilar 259 P. 735, Connel v. Higgins 150 P. 769, Sqarlat v. Griffith 36 A.2d 330, Black's Law Dictionery, 13 Am Jur 2d 43, 44 Building Contracts, 17 Am Jur 2d 375 - 378 Contracts,Corbin on Contracts, Vol 3A, chapter 36, §§ 700-712, Substantial Performance, A Treatise on the Law of Contracts by Samuel Wilison, Third Edition, vol's 5&6, 17A C.J. S. §§508 - 515 Contracts.

By this time judicial performance was at a disgusting low. The trial judge had lied, ignored the law, and refused to follow his oath and the Virginia supreme Court buried it and complaints of it. Petitioners were without a forum because Petitioner Charles Anderson had complained of it and sued on it. The court had revealed itself for what Petitioner Charles Anderson had alledged it was.

It's also interesting to note that these same Parties defendant, same subject mat-

ter, same property, same issues, and same statutes and case law had prevailed, i.e. Complainant's cause was dismissed and lien released, in American Paving supra by Judge William Plummer. Trial judge had gone to extremes but apparently felt confident in getting away with it against both spouses.

There can be no due process or fair, unbiased hearing when trial judge has such personal, harmful, and wrongful involvement with Petitioner Charles Anderson as above and as continued below in greatly summarized form. See agreed Statement of Facts in Appendix. See Va. Code §54-142 in Appendix.

(1) Anderson had sued Middleton three times in federal court with 4CCA stating in all of them that Anderson's allegations of conspiracy by Middleton to take his house were factual and in good faith.

(2) Anderson grieved Middleton several times before the Judicial Review Commission.

(3) It started a few years ago when

Middleton tried to put Anderson is jail on something a jury cleared him of, but Middleton as trial judge therein wouldn't accept it personally. That was only one of eight such attempts all prior to this cause and subject of complaint continuously. He never succeeded.

(4) Middleton refused to recuse himself at trial upon Petitioners' most emphatic demands, but made derogatory remarks to and of Anderson then and during trial.

(5) Middleton had refused to hear Petitioners' motions on release of liens for lack of proper perfection under Virginia Code § 43-17, 17.1, 23, etc. on several occasions and refused to allow Petitioners speak or argue at such motions.

(6) Middleton allowed Respondent's Counsel to lie openly and notoriously before the court at trial and to proceed against Anderson though Anderson had moved for his

(Sickles') release from the case because of attorney/client conflict between he and Anderson from recently before and to use as witness at trial another attorney, Wm Arnold, who also had an attorney/client priviledge conflict with Anderson, and also under the following conditions: Anderson sued Middleton and Sickles in federal court on conspiracy to take his house, Middleton moved (as defendant) against Anderson (as plaintiff) for sanctions under FRCP 11 (frivolous suit), Anderson (as defendant) moved Middleton (as judge) for removal of Sickles from the case (for above mentioned conflict citing Sickles' admission of it, admission of Sickles' partner of it, and Judge Plummer's positive ruling on it) and for that Middleton cited Anderson with $1200 in sanctions for Sickles against Anderson under Va. Code §8.01-271.1, while Middleton and Sickles both

(as defendants in federal court) were moving against Anderson (as plaintiff) (for sanctions) and while (during the trial of this cause) the Fourth Circuit Court of Appeals reversed and remanded U. S. District Court on its moving against Anderson without notice and on its Rule 11 sanctions without a showing of lack of good faith (which district court judges were also sued for the same cause).

(7) On March 25 and June 17, 1988 motions, Middleton lied and tricked Petitioner Mitsuko Anderson's counsel, Mr. George J. Viertel, by refusing a release of said lien by payment under Va. Code §43-70 saying that it came "one second too late" just after he entered a final order in the case and was thus out of his hands, having just previously told Mr. Viertel that he couldn't sign the order for release of lien because he didn't know the amount of judgment because he hadn't signed the final ord-

er yet! When Petitioner Charles Anderson said that that was crazy and nothing but a trick, Middleton told Charles Anderson to look for somebody to complain to of it if he could find anybody left. Upon Anderson's objecting vehemently, Middleton said possibly so, but in any event the Clerk of Court couldn't take any money until there had been an appeal noted. Petitioners came back on June 17, 1988 with the same motion after having had noted their appeal, whereupon Middleton said that Petitioners were one second late again!

If this Petition for Writ of Certiorari and subject matter isn't quite proper at this point or if all the backup paper isn't appended, kindly keep in mind that the nature of the events are lies and tricks by the court and their refusal to follow the law or memorialize events. Petitioner frustration is a gross understatement.

(8) Middleton intentionally frustrated Petitioners' discovery even as to Petitioners' motion to require Respondent to elect to proceed under a theory of Petitioner Anderson being agent for his wife or being a general contractor until actual trial (causing loss of opportunity to properly use time to prepare defense on that issue) and then, upon Respondent's election to proceed with Anderson being a general contractor, Middleton brought the issue of agency back into the trial sua sponte. (which then he later changed his mind on on January 21, 1988 after having argued it as a necessary and essential element of his Letter Opinion finding of enforceability) (see page 20)

(9) On March 7, 1986 upon Petitioner Mitsuko Anderson's counsel's motions to release liens in American Paving, supra, founded in certain spousal defenses, com-

plaint (therein) resisted saying that Petitioners were not married (without reason and without proffer, but knowing that Middleton would run with it because he knew of the judicial hatred because he too had previously been counsel to Anderson) and of course Middleton ran with it, whereupon Anderson offer to take the stand and produce an original marriage certificate issued by a Vice Consul of the United States. Middleton ran off the bench saying he would be back at 2 P.M. to continue the matter, but when in chambers told counsel that he knew Anderson as a liar and wouldn't believe a word he said on anything and never came back to the bench at 2 P.M.! Ultimately the marriage was proven at trial but only after Middleton had run Anderson through 19 more months of further judicial

conspiratoral harm with Commissioner Mackall and carried his hatred for Anderson over to harm his wife's rights too.

CONCLUSION

This cause has not been heard by an unbiased and honest trier of fact.

The facts of the case presented herein are uniquely supplemented by Petitioner Charles Anderson's Statement of Facts filed May 17, 1988 (included in Appendix at page A-19) and by trial judge's June 27, 1988 agreement with most of the numbered paragraphs therein (included in Appendix at page A-14). Rule 5:11 (d) requires the trial judge to "overrule" (he didn't), "make corrections" (he didn't), "include...additions to ...complete" (he didn't), and "certify the manner...in-complete" (he didn't). Rule 5:11(d) allows Respondent (as complainant) to "...specify errors alleged..." (but he didn't). Thus there is, according to Rule 5:11(d), agreement with the majority of Petitioner's numbered paragraphs.

Due process under the 14th Amendment has been denied in the taking issue by way of the ruling on enforceability against the Tenancy by the Entirety interest of Petitioner/wife whose interest cannot be held under the law there having been no authorization, contracting, use of agency, estoppel, knowledge, or any involvement whatsoever by her.

The law absolutely requires dismissal of the cause and release of the subject mechanics' lien in that no court can recognize a non-party, i.e., a party with no legal status, viz., Respondent being without the statutory required license as a contractor (improvement to realty) and local license -- a criminal act.

WHEREFORE Petitioners respectfully pray this Honorable Court grant their Petition for a Writ of Certiorari to the Circuit Court in Virginia for Fairfax

County to dismiss this cause and release the subject lien under appropriate law and to charge Respondent with their costs in defense. Supercedeas requested.

Respectfully submitted,

CHARLES M. ANDERSON
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7/17/89

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PROOF OF SERVICE

CHARLES M. ANDERSON, after being duly sworn, disposes and says that pursuant to Rule 28.4(a) of this Court, he served the within Petition for Writ of Certiorari on counsel for the Respondent by enclosing three copies thereof in an envelope, first class postage prepaid, addressed to:

Charles Sickels, 4010 University Dr.
Fairfax, VA. 22030

and depositing same in the U. S. mail in Fairfax, Virginia on 7/17/89.

/s/
CHARLES M. ANDERSON, Affiant

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX, to-wit:

Subscribed and sworn to before me this 17 day of July, 1989.

/s/
NOTARY PUBLIC

My commission expires _____.

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